

FREE CONSENT

MEANING OF CONSENT: Consent simply means an act of assenting to an offer. **According to Sec. 13, "Two or more persons are said to consent when they agree upon the same thing in the same sense"** In English law, this is called '**consensus ad idem.**' Consent involves identity of minds in respect of the subject-matter of the contract. When there is no consent at all, the agreement is void ab initio, i.e. it is not enforceable at the option of either party.

MEANING OF FREE CONSENT: Free consent is one of the essential elements of a valid contract. **Sec. 14** describes the cases when the consent is not free. This is a negative definition of free consent in the sense that it mentions some negative elements, the presence of which in a contract would vitiate a contract. **Consent is said to be free when it is not caused by-**

- ⇒ **Coercion [Section 15]**
- ⇒ **Undue influence [Section 16]**
- ⇒ **Fraud [Section 17]**
- ⇒ **Misrepresentation [Section 18]**
- ⇒ **Mistake [Section 20, 21, 22]**

If consent was caused by coercion, undue influence, fraud, misrepresentation the contract is voidable at the option of party whose consent was so taken [Sec. 19, 19A]

1) **COERCION:** Coercion simply means compelling or forcing a person to enter in to a contract under a pressure or a threat. Sec. 15 defines coercion as, "**Committing or threatening to commit, any act forbidden by the Indian Penal Code, or unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever with the intention of causing any person to enter into an agreement**".

The essential elements of coercion are-

- (a) Committing or threatening to commit any act forbidden by Indian Penal Code.
 - (b) Unlawful detaining or threatening to detain any property.
 - (c) The act of coercion may be directed at any person and not necessarily at the other party to the agreement.
 - (d) The act of coercion must be done with the object of inducing or compelling any person to enter into an agreement.
- **Effect of threat to commit suicide-** As such, a suicide and a threat to commit suicide are not punishable under Indian Penal Code but an attempt to commit suicide is punishable under the IPC. This does not mean that suicide and threat to commit suicide are permitted by IPC. The question whether a threat to commit suicide amounts to coercion or not was considered by Madras High Court in the case of **Chikham Ammiraju v. Seshamma**. Threat to commit suicide was held to be amounting to coercion in this case.
 - **Effect or co-ercion [Sec. 19, 64, 72]** - When coercion is employed to obtain the consent of a party the contract is voidable at the option of the party whose consent was obtained by coercion [**Sec. 19**]. When such aggrieved party exercises his option to treat the voidable contract as void, it is called "**rescinding a contract**". Further, as per Sec. 64, the party rescinding the contract shall restore the benefit received by him under the contract, to the person from whom the benefit was received. Also, the party to whom money has been paid or anything delivered under co-ercion, must repay or return it [**Sec. 72**]

BURDEN/ONUS OF PROOF: The burden of proving that consent was obtained by coercion, and the aggrieved party would not have entered into contract had coercion been employed, lies on the party intending to avoid the contract.

- 2) **UNDUE INFLUENCE:** It is kind of moral or mental coercion. The term “undue influence” means dominating the will of the other person to obtain an unfair advantage over the other.

Sec. 16(1) defines undue influence as, “A contract is said to be induced by undue influence-

- ✓ Where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of other and
- ✓ The dominant party uses that position to obtain an unfair advantage over the other.”

According to Sec. 16 (2), a person is deemed to be in a position to dominate the will of another in the following circumstances-

- (a) Where he holds a **real or apparent authority** over the other e.g., in the relationship between master and servant, parent and child, Tax officer and assessee etc.
- (b) Where he stands in **fiduciary relation** to the other. **It implies a relationship of mutual trust and confidence. Examples:** A trustee and beneficiary, spiritual or religious adviser (guru) and his disciple, solicitors and clients, guardian and ward etc.
- (c) Where a contract is made with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress. **Example:** Medical attendant and patient.

According to judicial decisions held in various cases, there is no presumption of undue influence in the following relationships-

- (a) Husband and wife (other than pardanashin)
- (b) Landlord and tenant
- (c) Creditor and debtor

CONTRACTS WITH PARDANASHIN WOMAN: A woman who observes complete seclusion (i.e. who does not come in contact with people other than her family members) is called pardanashin woman. There is a legal presumption that a contract with a pardanashin woman is induced by undue influence. In such cases, the burden of proof completely lies on the person who enters into a contract with a pardanashin woman and he will have to prove-

- ⇒ That he made full disclosure of all the facts to her
- ⇒ That she understood the contract and the implication of the contract on her interests.
- ⇒ That she was in receipt of competent independent advice before entertaining into the contract.

- **Effect of undue Influence:** [Section 19A] When consent to an agreement is caused by undue influence, the contract is voidable at the option of the party whose consent was so caused. Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as the court may seem just.

Burden of Proof: When a contract is avoided on the ground of undue influence, the liabilities of the dominant party and the weaker party to prove are as under-

The weaker party has to prove-

- a. That the other party was in a position to dominate the will
- b. That the other party actually used his influence to obtain an unfair advantage
- c. That the transaction is unconscionable (unreasonable)

In case of unconscionable transaction, the dominant party has to prove that such contract was not induced by undue influence.

[**NOTE:** A transaction is said to be unconscionable if the dominant party makes an exorbitant profit of the other's distress.]

DIFFERENCE BETWEEN COERCION AND UNDUE INFLUENCE

BASIS OF DISTINCTION	COERCION	UNDUE INFLUENCE
1. DEFINITION	Coercion is the committing or threatening to commit, any act forbidden by the I.P.C. or unlawful detaining or threatening to detain any property with the intention of causing any person to enter into an agreement.	Undue influence is an influence which arises where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
2. RELATIONS	In case of coercion, relation between the parties is immaterial.	In case of undue influence, in the relation between the parties the parties must be such that one of them is in a position to dominate the will of other.
3. INTENTION	Coercion is applied with the intention of causing any person to enter into an agreement.	It is exerted with the intention to obtain an unfair advantage over the other party.
4. NATURE OF FORCE	It involves physical force.	It involves moral force.
5. KIND OF ACT	It involves criminal act.	It does not involve criminal act.
6. DIRECTION	The coercion may be directed against any person including a stranger.	Under influence is used against the weaker party only.
7. WHO CAN EXERCISE?	It can be exercised by any person. Even a stranger to contract can exercise it.	It is employed by the person who is in a position to dominate the will of the other.
8. REMEDIES	A contract caused by coercion, may be avoided by the aggrieved party's contract. [Sec. 19]	In case of undue influence, the aggrieved party may avoided the contract or the Court, may set aside the contract absolutely or conditionally. [Sec. 19 A]

The presumption of undue influence can be rebutted by showing-

- ✓ That the dominant party has made full disclosure of all the facts to the weaker party before making the contract;
- ✓ That the price was adequate; and
- ✓ That the weaker party was in receipt of competent independent advice before entering into the contract.

3) **FRAUD:** The term 'fraud' means a fake or false representation of facts made willfully with a view to deceive the other party. **Sec. 17** defines fraud as, any of the following acts committed by a party to a contract (or with his connivance, or by his agent) with intent to deceive another party thereto (or his agent) or to induce him to enter into the contract-

- a) The suggestion that a fact is true when it is not true by a person who does not believe it be true. **Example:** A sells to B locally manufactured goods as imported goods charging a higher price, it amounts to fraud.
- b) The active concealment of the fact by a person having knowledge or belief of the fact. Mere concealment does not amount to fraud. But where steps are taken by a seller concealing some material facts so that the buyer even after a reasonable examination cannot trace the defects, it will amount to fraud.
Example: A, a furniture dealer, conceals the cracks in furniture sold by him by using some packing material and polishing it in such a way that the buyer even after reasonable examination cannot trace the defect, it would tantamount to fraud through active concealment.
- c) A promise made without any intention to perform it.
- d) Any such act or omission as the law specifically declares to be fraudulent. Example: Under Companies Act and Insolvency Acts, certain kinds of transfers have been declared any other clause.
- e) Any other act fitted to deceive. It covers those acts which deceive but are not covered under any other clause.

ESSENTIAL ELEMENTS OF FRAUD

1. The fraud must be committed by a party to a contract or by anyone with his connivance or by his agent. Thus, the fraud by a stranger to a contract does not affect the validity of the contract.
2. There must be a false representation and it must be made with the knowledge of its falsehood. Where the representation was true at the time when it was made but becomes untrue before the contract is entered into and this fact is known to the party who made the representation, it must be corrected. If it is not so corrected, it will amount to fraud.
3. The representation must relate to a fact. In other words, a mere opinion, a statement of expression or intention does not amount to fraud.
4. The fraud must have actually deceived the other party who has acted on the basis of such representation. In other words, an attempt to deceive the other party by which the other party is not actually deceived is not a fraud.
5. The party acting on the representation must have suffered some loss.

When the silence amount to fraud??

GENERAL RULE: Mere (only) silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud.

EXCEPTION: Where the circumstances of the case are such that regard being had to them, it was duty of the person keeping silence to speak. Such duty arises in the following two cases-

- a) Duty to speak exists where the parties stand in a fiduciary relationship, e.g. father and son, guardian and ward, trustee and beneficiary etc. or where contract is a contract of ubberima fidei (i.e. requiring utmost good faith), e.g. contracts of insurance.
- b) When silence itself is equivalent to speech.

4) **MISREPRESENTATION:** The term 'misrepresentation' means a false representation of fact made innocently or non-disclosure of a material fact without any intention to deceive the other party.

As per **Sec. 18**, misrepresentation means and includes a wrong statement of fact made innocently, i.e., without any intention to deceive the other party. It may be caused-

- a) By positive assertion or a statement, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

- b) By breach of duty, which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him;
- c) Causing, however innocently, a party to an agreement, to make a mistake regarding the subject matter of the agreement.

Essential of misrepresentation-

- a) There must be a representation or omission of a material fact and such false representation must be made without the knowledge of its falsehood i.e. the person making it must honestly believe it to be true.
- b) The representation or omission of duty must be made with a view to inducing the other party to enter into contract but without the intention of deceiving the other party.
- c) The representation or omission of duty must have actually induced the party to enter into contract.

EFFECTS OF MISREPRESENTATION:

- 1. **Right to rescind the contract:** The party whose consent was caused by misrepresentation can rescind (cancel) the contract but he cannot do so in the following cases-
 - a) Where the party whose consent was caused by misrepresentation had the means of discovering the truth with ordinary diligence.
 - b) Where the party gave the consent in ignorance of the misrepresentation.
 - c) Where the party after becoming aware of the misrepresentation, takes a benefit under the contract.
 - d) Where an innocent third party, before the contract can be rescinded, acquires for consideration some interest in the property passing under the contract.
 - e) Where the parties cannot be restored to their original position.
- 2. **Right to insist upon performance:** The party whose consent was caused by misrepresentation may if he thinks fit, insist that the contract shall be performed and that he shall be put in the position in which he would have been if the representation made had been true.

DISTINCTION BETWEEN FRAUD AND MISREPRESENTATION

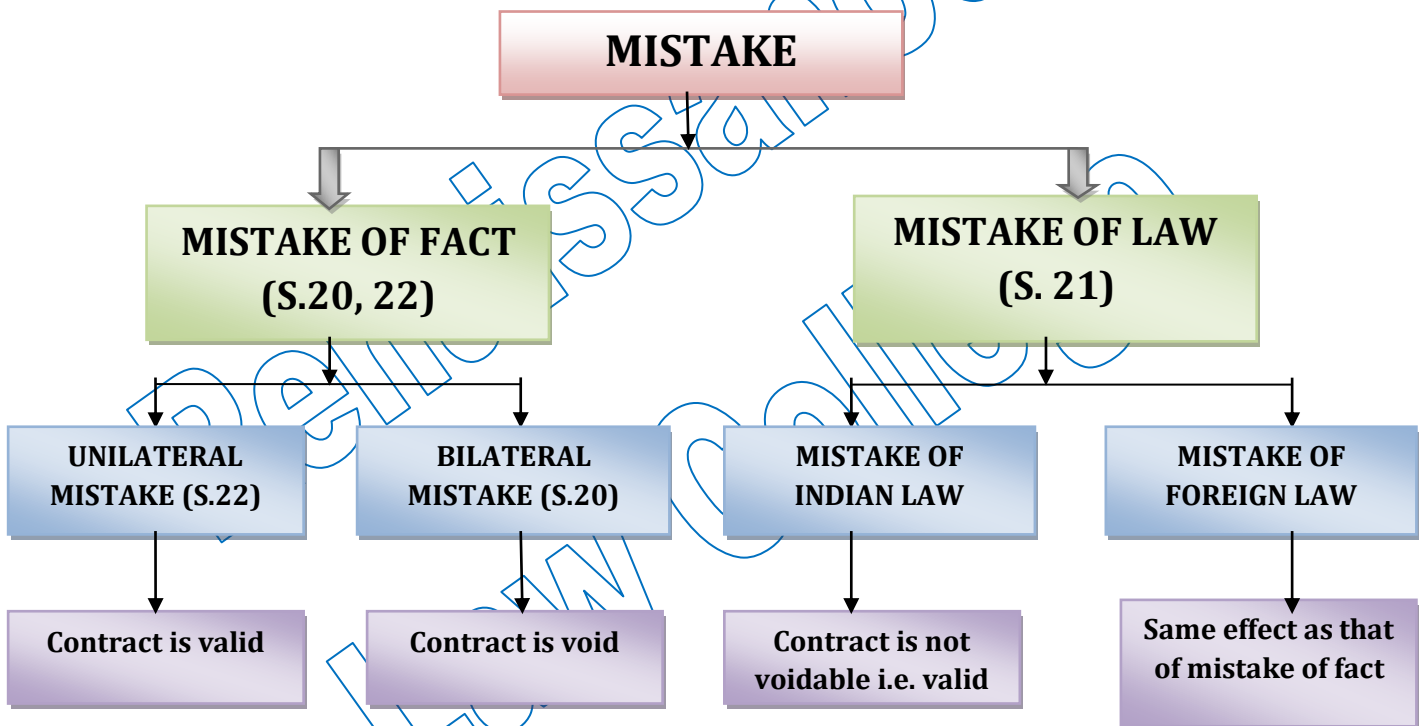
BASIS OF DISTINCTION	FRAUD	MISREPRESENTATION
1. MEANING	A fraud is an intentional misrepresentation or concealment of material fact to induce the other party to enter into a contract.	An innocent or unintentional misrepresentation of material facts by one party fact to induce another to enter into a contract, without an intention to deceive.
2. INTENTION	Fraud is committed with an intention to deceive	There is no such intention to deceive.
3. BELIEF IN THE FACTS	The person committing fraudulent act does not believe it to be true.	The person making misrepresentation believes in the facts to be true and existing.
4. SUIT FOR DAMAGE	The aggrieved party has right to sue the other party for damages.	The aggrieved party cannot sue for damages.
5. DEFENSE	A party cannot set up a defense that the aggrieved party had means of	In case of misrepresentation the other party always set up a defense that the

	discovering the truth except in case of fraud by concealment or by silence.	aggrieved party that the aggrieved party had means of discovering the truth.
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5) **MISTAKE** (Sec. 20, 21, 22): A mistake is said to have occurred where the parties intending to do one thing by error do something else.

According to Sec. 20 mistake means erroneous belief concerning some fact. The parties are said to consent when they agree upon the same thing in the same sense. If they do not agree upon the same thing in the same sense, there will be no contract.

When the consent of one or both the parties to a contract is caused by misconception or erroneous belief, the contract is said to be induced by mistake.



(a) **MISTAKE OF LAW:** As regarding mistake of law, there is a judicial principle based on a maxim i.e. '*ignorantia juris non excusat*' which means that ignorance of law is not excusable. Every person is bound to know the laws prevailing in the nation and therefore one cannot take a defense that he was not aware of the law and cannot evade from the performance of the contract provided it is a contract to perform some lawful act only and not something that is per se (i.e. in itself) unlawful. Although, mistake of foreign law has the same effect as that of a mistake of fact as foreign law is a matter of fact.

(b) **MISTAKE OF FACT** (Sec. 20 & 22): There is again a judicial principle regarding mistake of fact which is based on a maxim i.e. '*ignorantia facti excusat*' which means that ignorance of fact is excusable.

BILATERAL MISTAKE (Sec.20): An agreement is void where there is a bilateral mistake as to the subject matter. According to Section 20, "Where both the parties are under a mistake as to a matter of fact essential to the agreement, the agreement is void." Thus, the following three conditions must be satisfied before declaring a contract void under this section-

- ⇒ Both the parties must be under a mistake
- ⇒ Mistake must be of fact but not of law.
- ⇒ Mistake must relate to an essential fact.

According to the explanation of Sec.20, "An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact."

1) **Bilateral mistake as to subject matter includes-**

- a) Mistake as to existence of subject matter
- b) Mistake as to identity of subject matter
- c) Mistake as to title of subject matter
- d) Mistake as to price of subject matter
- e) Mistake as to quality of subject matter
- f) Mistake as to quantity of subject matter

- 2) **Mistake as to the possibility of performance-** The agreement is void where there is bilateral mistake as to the possibility of performance. In other words, where the parties to an agreement believe that the agreement is capable of performance, while in fact it is not so, the agreement is treated as void. The impossibility may either be physical or legal.

UNILATERAL MISTAKE (Sec.22): The term 'unilateral mistake' means where only one party to an agreement is under a mistake. According to Sec. 22, "**A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.**"

EXCEPTIONS: The agreement is **void** where a unilateral mistake relates to the identity of the person contracted with or the nature of the contract.

- 1) **Mistake as to identity of the person contracted with-** The agreement is void.
- 2) **Mistake as to the nature of contract-** The agreement is void
- 3) **Mistake as to other matter-** Agreement is not void.

EVERY AGREEMENT OF WHICH THE OBJECT OR CONSIDERATION IS UNLAWFUL IS VOID [SEC 23]

As per Sec. 10, consideration and object of an agreement must be a lawful one in order to constitute a valid contract; otherwise the agreement is void. Certain considerations and objects have been expressly declared as unlawful under Sec. 23 of the Indian Contract Act and therefore the contracts having such unlawful objects and considerations are void.

Following are the instances of unlawful objects and considerations-

- a) **If it is forbidden by law:** If the object or the consideration of an agreement is forbidden (i.e. prohibited) by law, the agreement is void. An act is said to be forbidden by law when it is punishable either by the criminal law of the country or by special legislation.
- b) **If it defeats the provisions of any law**
- c) **If it is fraudulent:** If the object of an agreement is to defraud others, the agreement is void.
- d) **If it involves or implies injury to a person or property of another**
- e) **If the court regards it as immoral or opposed to public policy:** It is not easy to define the term 'public policy' with any degree of precision because 'public policy' by its very nature, is highly uncertain and keeps on changing with the passage of time. In this regard, an agreement which conflicts with morals of the time and contravenes any established interest of society may be said to be opposed to public policy. In India, it has been left to the Court to hold any contract as unlawful on the ground of being opposed to public policy.

The following agreements have been held to be opposed to public policy-

- ✓ **Agreements of trading with enemy.**
- ✓ **Agreement for stifling prosecution.**
- ✓ **Agreement is the nature of maintenance and champerty:** Maintenance is an agreement whereby one party having no interest in suit, agrees to assist another to maintain suit. Champerty is an agreement whereby one party agrees to assist another in recovering property and in turn is to share in the proceeds of the action.
Both these agreements are declared illegal and void in English Law whereas all these agreements are not illegal in India. The Court will refuse to enforce such agreements if its object is not bonafide or the terms of reward are unreasonable in the opinion of court.
- ✓ **Agreement for the sale/Transfer of public offices and titles.**
- ✓ **Agreement in restraint of parental rights which prevents a parent from exercising his right to guardianship.**
- ✓ **Agreements in restraint of personal liberty.**
- ✓ **Agreement tending to create monopoly.**
- ✓ **Agreements interfering with course of justice.**
- ✓ **Agreement in restraint of marriage (Sec. 26)**
- ✓ **Agreement in restraint of trade (Sec. 27)**
- ✓ **Agreement in restraint of legal proceedings (Sec. 28)**

ILLEGAL AGREEMENTS

Illegal agreements are those agreements which are-

- (a) Void ab-initio, i.e. void from the very beginning, and
- (b) Punishable by the criminal law of the country or by any special legislation/regulation.

EFFECTS OF ILLEGAL AGREEMENTS:

- The collateral transactions to an illegal agreement also become illegal and hence cannot be enforced.
- No action can be taken for the recovery of money paid or property transferred under an illegal agreement and for the breach of an illegal agreement.

- **In case of an agreement containing the promise, some part of which is legal and other part is illegal, the legal position is as under-**
 - ⇒ If the illegal part cannot be separated from the legal part: The whole agreement is altogether illegal.
 - ⇒ If the illegal part can be separated from the legal part: The Court will enforce the legal part and reject the illegal part.

AGREEMENTS EXPRESSLY DECLARED AS VOID UNDER CONTRACT ACT

As per **Sec. 2 (g)**, void agreement is an agreement which is not enforceable by law i.e. it is void ab initio. Indian Contract Act enlists the following circumstances where agreements have been declared as void-

- ⇒ Agreement by or with persons incompetent to contract [**Sec.11**]
- ⇒ Agreement entered into through a mutual mistake i.e. bilateral mistake [**Sec.20**]
- ⇒ Where object or consideration is unlawful [**Sec.23**]
- ⇒ Where consideration or object is partially unlawful [**Sec.24**]
- ⇒ Agreement without consideration [**Sec.25**]
- ⇒ Agreement in restraint of marriage [**Sec.26**]
- ⇒ Agreement in restraint of trade [**Sec.27**]
- ⇒ Agreement in restraint of legal proceeding [**Sec.28**]
- ⇒ Where terms of contract is uncertain [**Sec.29**]
- ⇒ Agreement is a wagering agreement [**Sec.30**]
- ⇒ Agreement is an agreement to do an impossible thing [**Sec.56**]
- ⇒ An agreement to enter into an agreement in the future.

AGREEMENT IN RESTRAINT OF MARRIAGE (Sec. 26)

According to **Sec. 26** of the Indian Contract Act, every agreement in restraint of the marriage of any person **other than minor** is void. Any restraint of marriage whether total or partial, is opposed to public policy.

AGREEMENT IN RESTRAINT OF TRADE (Sec. 27)

Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void. This is because **Article 19 (1) (g)** of the Constitution of India regards the freedom of trade and commerce as a right of every individual. Therefore, no agreement can deprive or restrain a person from exercising such a right.

Interpretation of the words "...that extent..."

These words may be interpreted in the sense that only that portion of such agreement is void which is considered either as unreasonable or as opposed to public policy being in restraint of trade. The rest of the agreement would continue to be valid.

EXCEPTIONS TO SEC. 27

The exceptions here mean the cases where agreements in restraint of trade are not considered void. Such exceptions are-

A. Exceptions under Statutory Provisions-

- 1) **Sale of goodwill-** Seller of goodwill of a business may agree with the buyer to restrain from carrying on business. There are certain conditions of such restrictions to be valid-
 - a) Must relate to same business
 - b) Restriction shall apply within specified local limits.
 - c) Restriction shall apply within a reasonable time period
 - d) The specified local limits must be reasonable having regard to the nature of business.

Therefore, the buyer of goodwill may restrain the seller for carrying on any business similar to the one sold by him within certain vicinity and for a certain period of time provided the restrictions in regard to time and vicinity are found reasonable.
- 2) **Restriction on existing partner [Sec. 11(2) of Indian Partnership Act]-** Not to carry on business other than business of the firm till he is partner.
- 3) **Restriction on outgoing partner [Sec. 36 (2), Indian Partnership Act]-** An outgoing partner may agree with his partners that he will not carry on any business similar to that of the firm within a specified period or within specified local limits. Such agreements shall be valid only if the restrictions are reasonable. This restriction also implies not to carry on a similar business after retirement
- 4) **Restriction on partners upon or in anticipation of dissolution of a partnership firm [Sec. 54, Indian Partnership Act]:** Partners may, upon or in anticipation of dissolution of a partnership firm, agree that some or all of them will not carry on business similar to that of the firm within specified periods or local limits. Such agreement shall be valid only if the restrictions are reasonable.
- 5) **Sec. 55(2), Indian Partnership Act:** Partner may agree with due buyers of goodwill, not to use the firm name or carry on firm's business or solicit clients of the firm.
- 6) **Restriction in case of sale of goodwill [Sec. 55(3), Indian Partnership Act]:** Upon sale of firm's goodwill, a partner may agree that he will not carry on any business similar to the firm within specified periods or local limits.

B. Exceptions under Judicial Interpretations-

- 1) **Trade combinations:** Trade combinations which have been formed to regulate the business or to fix prices are not void, but the trade combination which tend to create monopoly and which are against the public interest are void.
- 2) **Sole dealing agreement:** An agreement to deal in the products of a single manufacturer or to sell the whole produce to a single dealer is valid if their terms are reasonable.
- 3) **Service agreements:** A clause in service agreement may or may not be in restraint of trade. An analysis of some of the clauses of service agreement is as under:
 - a) **An agreement to serve the employer for a stipulated period:** Such agreements, if reasonable, do not amount to restraint of trade and hence are enforceable.
 - b) **A clause to prevent the employee from accepting any other engagement during his employment:** Such agreements do not amount to restraint of trade and hence are enforceable.
 - c) **A clause to prevent the employee from accepting a similar engagement after the termination of his employment:**